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NO. 88-1414

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

KHALID PARWEZ,
RESPONDENT.

REPLY

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REPLY

As permitted by rule 22.5, the People of the State of California[1] reply to the Brief in Opposition[2] to the People's Petition for Writ of Certiorari[3]. Respondent Parwez has limited his opposition to the procedural aspects of review and not addressed the merits of the People's position. To these technicalities the People now respond:

1. Hereinafter, People.
2. Hereinafter, BIO.
3. Hereinafter, Petition.

ARGUMENT

I

WHEN ITS STATE GROUNDS EMANATE FROM ITS FEDERAL GROUNDS, A STATE COURT'S DECISION INVOLVES A FEDERAL QUESTION

In arguing that this Court should deny the Petition, respondent Parwez contends that when the California Supreme Court decided *People v. Superior Court (Engert)*, 31 Cal.3d 797, 183 Cal.Rptr. 800, 647 P.2d 76 (1982), hereinafter *Engert*, it relied upon "an adequate and independent state constitutional ground." BIO, pt. I, at 3. Parwez claims support for his contention from three observations: (1) *Engert* quoted from the earlier state case of *People v. McCaughan*, 49 Cal.2d 409, 414, 317 P.2d 974 (1957), BIO at 5, (2) *Engert* used a dual standard for assessing vagueness, BIO at 5-6, and (3) *Engert* refused to view the California constitution as insulating capital cases "'from the requirement of state constitutional due process.'" BIO at 7, citing to *Engert*, 31 Cal.3d at 809. However, rather than establishing the existence of an adequate and independent state ground, these observations, as we shall demonstrate below, corroborate the presence of the federal question in *Engert*. Accordingly, pursuant to *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937 (1962), the court below was bound to, and by stipulation did, Petn. at 5, follow *Engert*.

A

A Case Which Cites A Federal Case As Authority For Its Rule Can Be Said To Be Grounded On Federal Law

The quotation of *People v. McCaughan* in *Engert* is of no avail to Parwez's claim. Instead, it demonstrates the consistency of a grant of review here with this Court's determination to review those cases in which the decision appears "to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion . . . ." *Michigan v. Long*, 463 U.S. 1032, 1040, 77 L.Ed.2d 1201, 1214, 103 S.Ct. 3469, 3476 (1983).

McCaughan says, as quoted by *Engert*, "A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed *as well as a standard for the ascertainment of guilt by the courts called upon to apply it.*" 31 Cal.3d at 801. Looking to *McCaughan* to see from whence its author drew this rule, one finds citations only to *Winters v. New York*, 333 U.S. 507, 515-516, 92 L.Ed. 840, 68 S.Ct. 665 (1948); *In re Peppers*, 189 Cal. 682, 209 P. 896 (1922); *People v. Building Maintenance Contractors' Assn.*, 41 Cal.2d 719, 725, 264 P.2d 31 (1953); and *People v. Saad*, 105 Cal.App.2d Supp. 851, 854, 234 P.2d 785 (1951), in that order; *Peppers, Building Maintenance* and *Saad* all refer back to cases of this Court as authority for the pronouncements contained therein on the subject of vagueness in statutes. See 41 Cal.2d at 724-725; 189 Cal. at 686; 105 Cal.App.2d Supp. at 854.

Thus, the quotation from *McCaughan* is a succinct summary of federal law as found in the decisions of this Court. Since, under *Michigan v. Long*, 463 U.S. at 1040, and even

under California law, a case which cites to federal law as the authority for the points found therein should be deemed *grounded* in federal law, *People v. Epps*, 182 Cal.App.3d 1102, 1114-1115, 227 Cal.Rptr. 625 (1986); cf. *People v. Preciado*, 31 Cal.App. 519, 520-521, 160 P. 1090, 1091 (1916), the fact that *Engert* relied upon the particular quotation from *McCaughan* tends to show, rather than the existence of independent and adequate state grounds, the existence of the federal question in both *Engert* and the present case.

B

Courts Of The United States And California Assess Vagueness Claims Using The Same Standards

Respondent states, "California's standard for assessing vagueness utilizes a dual measurement." BIO at 5. He describes the People as attempting "studious avoidance of this plain reliance [of *Engert*] on California decisional analysis . . . ." BIO at 6.

Respondent may describe the analysis in *Engert* as dual, but he cannot validly describe it as only California's. It is identical to the analysis to which this Court subscribes. For instance, *Winters v. New York*, this Court's case cited by *McCaughan* in support of the passage quoted by *Engert*, says in discussion of the issue of statutory vagueness, "The vagueness may be from uncertainty in regard to persons within the scope of the act, *Lanzetta v. New Jersey*, 306 U.S. 451, 83 L.Ed.888, 59 S.Ct. 618 (1939), or in regard to the applicable tests to ascertain guilt.[4]" 333 U.S. at 515-516; see also Grayned v. City of Rockford, 408 U.S. 104, 108, 33 L.Ed.2d

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"[4]. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-93; *Champlin Ref. Co. v. Corporation Commission*, 286 U.S. 210, 242; *Smith v. Cahoon*, 283 U.S. 553, 564."

222, 227; 92 S. Ct. 2294, 2298-2299 (1972). Thus, federal law recognizes the duality of an analysis for vagueness, and, as has been shown under point I.A., at page 3, *ante*, the California Supreme Court's statement of the required analysis in *McCaughan*, 49 Cal.2d at 414, summarizes federal law.

Indeed, it has been held "that vagueness contentions under the [California] Constitution should be governed by principles which guide a resolution of similar Fourteenth Amendment claims." *Allen v. Superior Court*, 113 Cal.App.3d 42, 53, 169 Cal.Rptr. 608 (1980) *overruled on other grounds*, 31 Cal.3d at 808, fn. 8. "[V]agueness analysis is coextensive under both the federal and California due process clauses." *Id.* at 54.

C

An Opinion's Attempt To Rely Upon The State As Well As The Federal Constitution Does Not Alone Establish The Independence Of The State Ground From Federal Law

The third and final observation which respondent imagines supports his contention of the adequacy and independence of *Engert*'s state grounds concerns the California Supreme Court's analysis of article I, section 27, of the California Constitution. BIO at 6-7; see *Engert*, 31 Cal.3d at 806-809. Section 27 says that the punishment of death should not "be deemed to contravene any other provision of" the California Constitution. CAL. CONST., art. I, § 27; 31 Cal.3d at 806 et seq. The state Supreme Court took the view that it could also base its decision in *Engert*, invalidating the "heinous murder" special circumstance,[5] upon the due process clauses of the state

5. CAL. PEN. CODE § 190.2(a)(14).

constitution,[6] thereby avoiding a broad construction of the language of section 27.

However, notwithstanding *Engert*'s discussion of section 27, the opinion does not retreat from the pronouncements in *Allen v. Superior Court* that California measures vagueness under federal standards, 113 Cal.App.3d at 53-54, see pt. I.B. at p. 5, *ante*, and sets forth no separate or different standard for analysis under the state constitution. In fact, based upon what it felt were differing state statutory procedures under consideration in the respective cases, *Engert* distinguished this Court's decision in *Proffitt v. Florida*, 428 U.S. 242, 249 L.Ed.2d 913, 96 S.Ct. 2960 (1976) from *Engert*, 31 Cal.3d at 804-806, concluded that *Proffitt* had not decided the federal question decided in *Engert*, *id.* at 805, and then decided on its own that the California statute was "unconstitutionally vague and violative of the due process clause of the Fourteenth Amendment of the United States Constitution" as well as the state constitution. *Id.* at 806.

So, it does "fairly appear" that both *Engert*, and, hence, the decision of the court below in this case, "rest primarily on federal law," *Michigan v. Long*, 463 U.S. at 1040, and are "interwoven with the federal law and [ ] the adequacy and independence of [the] state law ground is not clear from the face of the opinion . . . ." *Ibid.*

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6. CAL. CONST., art. I, §§ 7(a) and 15, cl. 7.

II

THE COURT SHOULD GRANT REVIEW WHERE THE SEARCH FOR A NARROWING PRINCIPLE ON THE REACH OF A HEINOUS MURDER SPECIAL CIRCUMSTANCE CAN ONLY HAPPEN AFTER THIS COURT CORRECTS THE STATE COURT'S ERROR OF FEDERAL LAW

Respondent has "chutzpah."[7] In front of the magistrate, he demurred to the charge of the heinous murder special circumstance. The magistrate sustained his demurrer. It was, thus, respondent who chose to litigate the lawfulness of the special circumstances without the facts being before the court. So far, he has been successful. Now, on the People's appeal from the magistrate's ruling on his demurrer, he brays that an adequate review needs a showing of facts. BIO, pt. II at 7-10. Not so. In the absence of this Court's correction of the course presently being sailed by the California courts, the People will be left ashore without the opportunity ever to bring aboard the facts. The discussion that follows therefore addresses respondent's contention that this case "is in an inappropriate procedural posture" for review here. BIO at 7.

A

California Penal Code Section 871.5 Guarantees No Post-Preliminary Hearing Review Of Charges As To Which The Magistrate Has Sustained A Demurrer

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7. See *People* v. *Whigam*, 158 Cal.App.3d 1161, 1167, fn. 10, 205 Cal.Rptr. 227 (1984), disapproved on other grounds, *People* v. *Poole*, 168 Cal.App.3d 516, 524, fn. 7, 214 Cal.Rptr. 502 (1985).

Respondent claims that an appeal from the magistrate's sustaining of a demurrer is an "inappropriate procedural juncture" for review of "this question," BIO at 8, and that the People's appeal is somehow unfair to him. *Ibid.* The People cannot fathom the claim of unfairness, since before the inception of the preliminary hearing at which facts are presented respondent pressed for the resolution of the validity of the special circumstance allegation that has forced the People to embark upon their present quest for relief at this "juncture."

In stating this claim, respondent says that what the People should have done was to instead develop "a factual basis for the allegation at the preliminary examination." BIO at 9. He does not say how this could have been done. Undoubtedly, he would have objected to any such developments by the prosecution, and the magistrate would have sustained his objections, since, in the absence of the allegation of the special circumstance, facts to support it would have been immaterial.[8] In the absence of such a factual development, neither section 871.5[9] nor any other California statute provides the People with an adequate remedy for the magistrate's dismissal of an allegation following the presentation of evidence at the preliminary hearing. On any course other than that pursued by the People in this appeal, they would likely have had no further opportunity to present this issue to this Court in this case. Cf. *Pennsylvania v. Ritchie*, 480 U.S. 39, 47-48, 94 L.Ed.2d 40, 51-52, 107 S.Ct. 989, 996-997 (1987).

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8. See, e.g., *Trafton v. Youngblood*, 60 Cal.2d 17, 32, 69 Cal.Rptr. 568, 442 P.2d 648 (1968). "No evidence is admissible except relevant evidence." CAL. EVID. CODE § 350.

9. California Penal Code section 871.5 is set out verbatim in the Appendix to the Petition at A-11 to A-13.

B

The Factual Basis From Which To Search For A Narrowing Principle In A Heinous Murder Special Circumstance Is Not A Prerequisite To Certiorari

Recognizing that this Court has held that heinous murder aggravating circumstances in statutory schemes providing for capital sentencing can survive when the facts are within "some narrowing principle" or limiting construction on the statute, *Maynard v. Cartwright*, __ U.S. __, __, 100 L.Ed.2d 372, 381, 108 S.Ct. 1853, 1859 (1988), respondent would interpose that requirement of due process as an obstacle to review itself. BIO at 11.

However, the California Supreme Court in *Engert* itself decided the validity of California's heinous murder special circumstance on the basis of *facial* validity without consideration of the factual context out of which the litigation arose.[10] Thus, this case presents this Court with the opportunity to consider the issue here in the same context in which the California Supreme Court decided that issue in *Engert*. The People seek from this Court no limiting construction of the special circumstances statute, but a direction to the state court not to set the allegation aside under an erroneous view of federal law. Such a direction will give the People the day in court to which they are also entitled, *Stein v. New York*, 346 U.S. 156, 197, 97 L.Ed 1522, 1549, 73 S.Ct 1077, 1099 (1953),[11] *California Department of Corrections v. Superior Court*, 199 Cal.App.3d 1087, 1092, 245 Cal.Rptr. 293 (1988) (prosecution entitled to due process), and with which they can then establish the "factual anchor" respondent finds lacking.

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10. The opinion in *Engert* does not set forth any of the facts of the case.

11. Overruled on other grounds in *Jackson v. Denno*, 378 U.S. 368, 391, 12 L.Ed.2d 908, 924, 84 S.Ct. 1774, 1788 (1964).

BIO at 8. Respondent is "due" no more process from this Court than was afforded the People of California by their own State Supreme Court in *Engert*.

CONCLUSION

The procedural arguments with which Parwez opposes the Petition actually support granting the Petition because, when analyzed, they corroborate the existence of the federal question that the People here seek to resolve in accordance with the decisions of this Court. The correctness of the People's position on the merits has not been attacked herein by respondent. The Court should grant the Petition so that California's aberrational interpretation of the constitutionality of its heinous murder special circumstance can be reconsidered in light of the overwhelming contrary interpretations of other jurisdictions that have considered the issue.

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